**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| **ARGOS USA LLC d/b/a ARGOS READY MIX, LLC,** | ) | |
| **Respondent,** | ) | |
| | ) | **Cases 12-CA-196002** |
| **and** | ) | **12-CA-203177** |
| **CONSTRUCTION AND CRAFT WORKERS LOCAL UNION NO. 1652, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO** | ) | |
| **Charging Party.** | ) | |

**RESPONDENT'S REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

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## A. INTRODUCTION

This reply brief addresses the arguments in counsel for the General Counsel's (CGC) answering brief regarding Respondent's exceptions to the judge's findings that its confidential information and cell phone policies are unlawful under *The Boeing Company*, 365 NLRB No. 154, slip op. (2017), and that it unlawfully suspended and discharged employee Emmanuel Excellent pursuant to the alleged overbroad cell phone policy.[1]

## B. CONFIDENTIAL INFORMATION POLICY

CGC does not refute that reasonable employees would understand the confidential information policy does not restrict them from using or disclosing their *own* information. CGC instead argues that reasonable employees would understand the policy prohibits them from using or disclosing "names, wages, benefits, discipline, and terms and conditions of their co-workers" (GC Br. 21). Contrary to CGC's suggestion, employees do not have an unfettered right to access or disclose their co-workers' information merely because "such information is a basic tool utilized in union organizing campaigns" (GC Br. 21). See *Ridgeley Mfg. Co.*, 207 NLRB 193, 196-197 (1973) ("[T]he applicable rule is that employees are entitled to use for organizational purposes information and knowledge that comes to their attention in the normal course of their work activity but are not entitled to their employer's private or confidential records.").

[1] CGC's answering brief also addresses Respondent's exceptions to the judge's findings that its electronic communications policy is unlawful under *Purple Communications, Inc.*, 361 NLRB 1050 (2014), and that it unlawfully failed to provide the Union notice and an opportunity to bargain before suspending Excellent under *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106, slip op. (2016). CGC contends that the judge correctly applied extant law to find these violations; however, CGC argues—consistent with her cross-exceptions to the judge's decision and with Respondent's exceptions—that *Purple Communications* and *Total Security* were wrongly decided and should be overruled. For the reasons set forth in its exceptions brief, Respondent disagrees with CGC that the judge correctly applied extant law but agrees with CGC that extant law was wrongly decided and should be overruled.

Argos would never disseminate information about employees to their co-workers (i.e., employees would never "receive" such information from Argos). Moreover, only employees who have a job-related reason to "obtain access to" information about other employees would have such access. Consequently, reasonable employees would understand from the first sentence of the policy that it does not apply to information about their own or their co-workers' wages, benefits, and terms and conditions of employment that may come to their attention in the normal course of their work activity.

CGC next argues that Respondent's reliance on *Mediaone of Greater Florida, Inc.*, 340 NLRB 277 (2002), is misplaced, despite the fact that the policy at issue in that case, like the one at issue here, defined confidential information as including, inter alia, "employee information." According to CGC, unlike the rule in *Mediaone*, Respondent's rule "does not contain language limiting the definition of confidentiality to information concerning intellectual property, proprietary business information, or information assets" (GC Br. 22). This is a distinction without difference.

The import of *Mediaone* is that the phrase "employee information" did not render the confidentiality policy unlawful, because it appeared within a larger provision prohibiting the disclosure of the employer's proprietary information, and it was surrounded by other examples that further illustrated the policy's intent. That is precisely what Respondent's confidential information policy does here.

CGC also attempts to distinguish *Mediaone* on the basis that Respondent's policy, unlike the policy at issue in *Mediaone*, includes the term "earnings," which CGC claims is "listed along with the term 'employee information'" (GC Br. 23). Contrary to CGC's insinuation, "earnings" and "employee information" are not side-by-side in the policy, but rather are separated by the word

"contract" (GC Exh. 3). Regardless, as Respondent argued in its exceptions brief (R. Br. 19), the common meaning of "earnings" does not include wages.

## C. CELL PHONE POLICY

CGC first argues that Respondent's cell phone policy potentially interferes with NLRA rights because employees have a right to communicate with each other about their terms and conditions during non-working time at work, and "drivers have extended waiting periods and/or breaks when they are away from the facility during substantial portions of the day" (GC Br. 25). CGC further argues that the CB radios and the time drivers spend at the facility (15 to 20 percent of their workday) are insufficient to compensate for their alleged inability to otherwise communicate during non-working time (GC Br. 27). CGC's arguments are unavailing.

Respondent does not dispute that employees have a right to communicate with each other about their terms and conditions during non-working time at work. However, CGC's assertion that drivers devote "substantial" non-working time at jobsites away from the plant is flat wrong.

First, drivers are *always* on working time when they are at a jobsite, even though they may be waiting to pour concrete. As employee Jose Perez testified, the drum is always rotating and must be constantly monitored (Tr. 165). CGC downplays this by claiming drivers only need to check the drum every 15 to 20 minutes to see if it has stopped rotating (GC Br. 26). That is not what Perez said. Perez said that drivers must monitor the drum to see if it stops *or to see if there is any change in the rotation*. According to Perez, "[T]he drum doesn't supposed (sic) to alter its rotation or stop by itself" (Tr. 165). He continued, "[I]f there is any change of the rotation or if the drum will stop, we will realize right away" (Tr. 165). Obviously, for a driver to realize "right away" that the rotation of the drum has changed or stopped, he must be vigilant. Thus, Perez's testimony does not support the proposition that drivers are not working during the time they are waiting to pour concrete.

Second, CGC overstates the amount of time drivers have to wait to pour concrete while at a jobsite. Perez testified that he has a 30 to 90 minute wait time at a job site only between 1 and 3 times per week (Tr. 163). Given that drivers average 3 to 5 two-hour deliveries per day in a given five-day week (Tr. 93, 109, 182, 365), that equates to, at most, 4.5 hours of "waiting time" (i.e., 90 minutes, 3 times per week) out of an average of 40 hours of delivery time per week. Thus, even if this waiting time is non-working time, it can hardly be considered "substantial."

Third, merely because drivers may be waiting at a job site to pour concrete does not mean they are on non-working time. In fact, an administrative law judge has held that ready mix drivers were on working time even when they were waiting to be dispatched. In *Ready Mixed Concrete Company*, Case 17-CA-20734 (2001) (not reported in Board volumes), the complaint alleged that a ready mix concrete company interfered with drivers' Section 7 rights by prohibiting them from leaving the waiting area—where they were waiting to be dispatched—to talk to union representatives who had parked on a street across from the company's property. The judge dismissed the allegation, rejecting the General Counsel's argument that the drivers had the right to converse with the union representatives because they were merely waiting for their next assignment. The judge explained:

> The General Counsel contends that requiring employees to stay in the waiting room was unreasonable and that employees have a right to converse with solicitors on work time. I disagree. It has long been established that work time is for work. And that an employer may set rules prohibiting solicitation on work time, and such is presumptively valid. It goes without saying that an employer can define what constitutes work, e.g., waiting in the break room to be dispatched. I conclude that the employees did not have a right under Section 7 to leave the waiting room while they were on the clock to be solicited by the union representatives.

Fourth, CGC wrongly takes issue with Respondent's argument that ready-mix drivers are akin to press and crane operators who are responsible for monitoring their equipment for substantial portions of their day. According to CGC, Respondent is comparing "apples to oranges

without citing to any record evidence . . . .” (GC Br. 26.) CGC misunderstands the point. No “record evidence” is necessary for Respondent to draw this parallel because it is common sense—especially for the NLRB, which regularly deals with the manufacturing industry—that press operators monitor and activate press machines to stamp out parts, and crane operators monitor and control cranes to move materials to different places. Thus, it was not incumbent on Respondent to produce evidence as to the job duties of crane and press operators to make this argument any more than it was incumbent on CGC to produce evidence that all employees have cell phones.

In any event, the comparison drawn by Respondent was not between the specific duties and responsibilities of machine operators and ready mix drivers but between their respective obligations to monitor and operate equipment (i.e., work) for periods of upwards of four hours at a time without a break. The point is that if an employer can lawfully prohibit a machine operator from possessing a cell phone in his work area during working time—a proposition CGC does not appear to dispute—then why can Argos not prohibit its drivers from possessing cell phones in their work areas during working time? CGC repeatedly dodges this critical question.

As a final matter, CGC argues that the time drivers spend at the facility (15 to 20 percent of their shift) is not sufficient to compensate for their alleged inability to communicate while away from the facility because “most of that time is spent performing work in and out of their truck cabs, performing duties such as pre-trip check, fueling, loading, inspecting the load, [and] washing and parking the truck” (GC Br. 27). CGC’s argument is refuted by the record evidence.

While drivers do indeed have to conduct pre-trip inspections before they leave the plant with a delivery (Tr. 90, 257), the record establishes that only takes them 10-15 minutes (Tr. 260). On the other hand, Emmanuel testified that employees may wait in the break room as long as an

hour for their first load. (Tr. 130, 142). During that time, he acknowledged, drivers talk to each other, use the restroom, and use their cell phones (Tr. 130, 143, 152).

CGC next argues that Respondent's objectives for its cell phone policy do not outweigh "the direct adverse impact" the policy has on employees' rights to communicate with each other about their terms and conditions of employment (GC Br. 29). As argued above and in Respondent's exceptions brief, there is no impact at all on employees' rights, because the policy only prohibits the possession and use of cell phones *during working time*. Even assuming a potential impact, however, CGC's contention that Respondent's legitimate business justifications do not outweigh any potential impact fails by a long shot.

First, CGC improperly discounts HR Director Mike Beer's testimony about the two prior accidents involving ready mix drivers distracted by cell phones. Parroting the judge, CGC simply points out that Beer did not witness the accidents or explain how he learned of the circumstances of the accidents, and that Respondent did not offer any documentary evidence to prove the accidents were the result of cell phone usage or possession (GC Br. 29). CGC and the judge misunderstand the point. Beer testified, without contradiction, that Respondent maintains its cell phone policy, in part, because of these accidents (Tr. 432-433). Whether or not the accidents actually occurred or had anything to do with cell phone possession/use is entirely irrelevant to Respondent's legitimate business reasons for the policy. Compare *Boeing*, above at 6 (accepting employer's justification that no-camera rule limits its risk of becoming a target of terrorist attack based solely on manager's testimony that employer has "documented evidence" of surveillance by potentially hostile actors).

Second, CGC argues that Respondent improperly relies on statistics published by the National Highway Traffic Safety Administration (NHTSA)—an agency of the U.S. Government—

regarding cell phone use and highway fatalities to support its legitimate business reasons for the policy. Contrary to CGC's understanding, the Board can take notice of the NHTSA statistics—even though Respondent did not introduce them into evidence during the hearing—under Rule 201 of the Federal Rules of Evidence. See Fed.R.Evid. 201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it[] . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); Fed.R.Evid. 201(d) ("The court may take judicial notice at any stage of the proceeding.").[2]

Third, CGC argues that Respondent's asserted justifications for its cell phone policy are undermined by Respondent: 1) permitting drivers of vehicles such as service trucks, front-end loaders, and light-duty trucks to possess cell phones in the cabs of their vehicles; 2) requiring ready mix drivers to use two-way radios; and 3) issuing Nextel phones to block truck drivers. CGC's arguments are unconvincing.

First, Respondent's ready mix trucks are "70,000 pound missiles" when fully loaded (Tr. 431), and Respondent's service trucks, front-end loaders, and light-duty vehicles weigh under 10,000 pounds. Respondent does not dispute the proposition that its non-commercial vehicles can still cause serious bodily injury and death; however, it is common sense that a 70,000 pound vehicle is much more difficult to maneuver and stop than a vehicle weighing less than 10,000 pounds. Moreover, Respondent's light-duty vehicles, unlike the ready mix trucks, have the capability of hands-free operation, and drivers are only allowed to make or receives calls if done so hands-free (GC Exh. 5, pp. 6-7).

[2] Indeed, the Board has routinely taken notice of statistical information from publically available government sources. See, e.g., *Lucky Cab Company*, 366 NLRB No. 56, slip op. at 2 fn. 1 (2018) (relying on Fed.R.Evid. 201 and taking notice of statistics published by the U.S. Bureau of Labor Statistics); *National Maritime Union of America, AFL-CIO*, 196 NLRB 1100, 1101 fn. 7 (1972) (taking notice of statistics that are "a matter of public record compiled by the U.S. Department of Commerce, Maritime Administration").

Second, the CB radios are simple devices consisting of a box that attaches to the dash or roof of a cab and a corded microphone with a single button that must be pushed to talk (Tr. 99-100, 167-168, 261). Unlike conventional cell phones, CB radios cannot be used to call anyone other than dispatch or another employee with a CB radio, and they are only supposed to be used when drivers are not driving. More importantly, unlike conventional cell phones, CB radios cannot be used to send text messages, take pictures or videos, surf the internet, watch movies, etc.

Third, the Nextel devices are simply walkie-talkies, which function similarly to the CB radios. The primary difference is that the Nextel devices look like old flip phones and can be used to directly call other Nextel users with the push of a button and without going over a public system where others can hear (Tr. 176-177, 237). Like the CB radios, however, the Nextel devices do not have the extensive capabilities of modern cell phones that are dangerously distracting to drivers.

### D. EXCELLENT'S SUSPENSION AND DISCHARGE

CGC argues that possessing a cell phone "falls within the ambit of Section 7" as contemplated by *Continental Group*, 357 NLRB 409, 412 (2011), because drivers "cannot effectively communicate with their co-workers about terms and conditions of employment without access to their cell phones" and, therefore, carrying a cell phone is a "necessary predicate" to employees' ability to engage in Section 7 activity (GC Br. 35).[3] As explained above and in Respondent's exceptions brief, drivers *can* effectively communicate with their co-workers during non-working time without having their cell phones in their trucks. Indeed, for an average of 15-20 percent of their shift, drivers are at the plant and are not operating a truck. As long as they are on non-working time—including time they are in the breakroom waiting for their next assignment—

[3] For the reasons set forth by then-Chairman Miscimarra in his dissent in *Butler Medical Transport, LLC*, 365 NLRB No. 112, slip op. at 10-24 (2017), *Continental Group*—and *Double Eagle Hotel & Casino*, 341 NLRB 112 (2003), enfd. as modified 414 F.3d 1249 (10th Cir. 2005), which it purports to "clarify"—should be overruled.

they are free to use their cell phones for any purpose. They are also free to engage in more conventional "face-to-face" Section 7 communication with their co-workers.[4]

CGC's and the judge's fixation on the notion that cell phones are an essential ingredient of effective Section 7 communication has no basis in fact or law. Again, Argos' employees have ample opportunity to effectively communicate with one another and/or a union during non-working time, including in the plant's breakroom and the approximately 128 hours each week they are *not* at work. CGC and the judge conveniently ignore or misconstrue this evidence. They also turn a blind-eye to the reality that employees did not regularly carry cell phones until roughly 75 years after the NLRA was enacted—yet, somehow, employees have long been able to effectively communicate with each other about their terms and conditions of employment.

CGC next argues that Excellent's suspension and discharge implicates Section 7 concerns because employees who witnessed his discipline would be chilled from carrying and using their cell phones for Section 7 activities anywhere in the vicinity of Respondent's property. CGC's argument is grounded in the mistaken premise that there is "no evidence that Excellent possessed or used the cell phone while operating a ready-mix truck or even brought the cell phone in his truck" (GC Br. 35). Contrary to CGC's assertion, there is considerable evidence that Excellent possessed and used his cell phone in his ready mix truck during working time.

Excellent's cell phone was discovered on the ground in a dangerous work area precisely where his driver's side door would have been minutes earlier when he was parked there (Tr. 269). He curiously admitted to management that he "always" had his phone in his pocket (Tr. 270-271). He failed to produce his cell phone records upon management's request, despite the fact that the

[4] CGC's assertions that drivers do not take long breaks at the facility and are not together at the facility at the same time (GC Br. 27) are directly contradicted by the record evidence (Tr. 130, 143, 152).

records—had they reflected he made no calls while operating his truck—would have exonerated him. And he never provided a different explanation for why his cell phone was discovered where it was.

CGC next challenges Respondent's position that it discharged Excellent for using his cell phone, rather than merely possessing it, while operating his truck. (GC Br. 36.) As the record makes clear, the driver utilization report, among other things, shows exactly when a driver begins to drive to a job, when he arrives, and he begins to drive back to the plant (R. Exh. 11, p. 1). Beer testified, without contradiction, that Excellent's cell phone records, when analyzed in conjunction with his driver utilization report, would reveal whether Excellent *used* his cell phone while operating the truck (Tr. 408). Beer also repeatedly conveyed this to Union representative Andrei Rolle between the time Excellent was suspended and the time he was discharged (R. Exh. 11). At no time did Excellent or Rolle express concern that Beer was only looking to prove whether Excellent *possessed* his cell phone at some point while he was away from the facility.[5]

CGC also argues that Respondent's assertions in its post-hearing brief to the judge that Excellent was suspended based on evidence that he possessed the phone in his truck undermines its position that his discharge was based on his suspected use—rather than possession—of the phone (GC Br. 37).

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[5] CGC offers no support for her assertion that the judge discredited Respondent's witnesses to the extent they suggested Excellent would have been reinstated if the records proved he had not used his cell phone while operating the truck (GC Br. 36, fn. 17).

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 23rd day of August, 2019, a true and correct copy of the foregoing RESPONDENT'S REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION was filed using the National Labor Relations Board's E-filing system, and a copy of the aforementioned was thereafter served upon the following parties via electronic mail as follows:

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